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IN THE

Supreme Court of the United States

October Term, 1949

No. 184

MARCELINO GARCIA, as Surviving Executor under the Last Will and Testament of Manuel Diaz, Deceased, EDITH GILMOUR DIAZ, MARY ADELA EADS and MANUEL DIAZ, JR.,

Petitioners,

against

PAN AMERICAN AIRWAYS, INC.,

Respondent,

and

R. O. D. SULLIVAN,

Defendant.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Petitioners,

against

PAN AMERICAN AIRWAYS, INC.,

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and

R. O. D. SULLIVAN,

Defendant.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

Petitioners, who are the surviving executor and heirs of Manuel Diaz, deceased, seek to have this Court review an order of the New York Court of Appeals and the judgment entered thereon affirming an order of the Appellate Division, Second Department, which in turn affirmed a judgment of the Supreme Court, Westchester County, in favor of the petitioners in the sum of $8,291.87, directing that petitioners' claim in excess of that amount be stricken.

This is the second petition for a writ of certiorari in this action. Initially, the petitioners as plaintiffs herein, moved for an order (R. pp. 5, 6 and 7) striking certain affirmative defenses contained in the answer of the respondent Pan American Airways, Inc. (R. pp. 29-39). The Supreme Court, Westchester County, denied plaintiffs' motion (R. p. 4, reported at 183 Misc. 258) and this order was affirmed by an order of the Appellate Division, Second Judicial Department (R. p. 72, reported at 269 App. Div. 287), which latter order was in turn affirmed by the Court of Appeals of the State of New York (295 N. Y. 852). This Court denied the petition for a writ of certiorari for want of a final judgment (329 U. S. 741).

Subsequently, the respondent moved in the Supreme Court, Westchester County, for judgment in favor of the plaintiffs in the sum of $8,291.87 and for a direction that the plaintiffs' claim in excess of that amount be dismissed (R. pp. 119, 120). This motion was granted by the Supreme Court, Westchester County (R. p. 141, 77 N. Y. Supp. (2d) 256, not officially reported), and affirmed by the Appellate Division, Second Judicial Department (R. p. 151, reported at 274 App. Div. 976).

Thereupon, petitioners moved the Court of Appeals for leave to appeal from the aforesaid judgment of affirmance. The Court of Appeals denied this motion (R. p. 162). Judgment was entered on said affirmance in the office of the Clerk of Westchester County on May 5, 1949 (R. pp. 166, 167).

The Facts and the Pleadings.

The petitioners brought the present suit to recover damages for the alleged wrongful death of Manuel Diaz and for the loss of his baggage and personal effects in the accident involving the aircraft "Yankee Clipper" near

Lisbon, Portugal, on February 22, 1943. The "Yankee Clipper" departed from New York on February 21, 1943, and after making stops at Bermuda and Horta, Azores, arrived near Lisbon in the evening of the following day, where it crashed into the waters of the Tagus River (R. p. 42).

The complaint (R. pp. 15-25) alleges in substance that the aforesaid accident was due to the negligence of the defendant Pan American Airways, Inc., and its agents and employees, including the defendant Sullivan, and that under the law of Portugal the defendants are jointly and severally liable to the widow and children of the decedent for the damages resulting from the death, unless the defendants prove that the crash and demolition of the aircraft were not due to their fault or negligence.

The answer of the respondent (R. pp. 26-41) sets forth five separate defenses. The first two affirmative defenses are based on the provisions contained in a multilateral treaty signed at Warsaw, October 12, 1929, commonly called the "Warsaw Convention", which regulates and governs the liability of air carriers in international air transportation, and to which the United States is a party by adherence, 49 Stat. pages 3000, *et seq.*

The first defense (R. pp. 29-32) pleads in substance that at the time the decedent met his death he was being transported under a contract of transportation wherein the place of departure and the place of destination were within the United States and there were agreed stopping places at Bermuda, Lisbon (Portugal), and Natal (Brazil); that the transportation was international transportation within and subject to the aforesaid Warsaw Convention. It is further alleged that the defendant Pan American Airways, Inc., duly complied with the conditions and requirements of the

Convention; that defendant and its agents took all necessary measures to avoid the damage claimed by the plaintiffs, except for such measures as were impossible for it or them to exercise, and defendant claims exemption from and limitation of liability in accordance with Articles 17, 18, 20, 22 and 24 of the Convention.

For a second separate defense (R. pp. 33-38) it is alleged that, in accordance with the terms of the contract contained in the passenger ticket the rights of the parties were governed by and subject to the rules relating to liability established by the said Warsaw Convention, and defendant claims exemption from and limitation of liability in accordance with the rules relating to liability for death established by the Convention.

In summary, the first separate defense pleads that the defendant's liability is limited by the Warsaw Convention as a matter of law, and the second separate defense pleads that it is so limited under the terms of the contract between the parties.

The Warsaw Convention.

The Warsaw Convention was originally signed by the representatives of twenty-three nations at Warsaw, Poland, on October 12, 1929. It is an international treaty, regulating and limiting the rights and responsibility of carriers by air in international transportation of passengers and property. The Convention, after it came into force, was left open for adherence by any State (Art. 38). The United States adhered to the Convention by proclamation of the President, dated October 29, 1934, as advised by the Senate June 15, 1934. The original text of the convention which is in French is contained in Statutes-at-Large, volume 49, Part 2, pages 3000, *et seq.* It has been ratified or adhered

to by thirty-two nations, including all or substantially all of the leading commercial nations of the world. Portugal, although not an adherent at the time of the accident, subsequently adhered to the treaty on March 20, 1947. See *United States Aviation Reports,* June, 1949, Treaty Data; and *A List of Treaties and Other International Acts of the United States in Force on December 31, 1941,* Department of States Publication No. 2103 (1944).

The Convention applies to all international transportation of persons, baggage, or goods performed by aircraft for hire (Art. 1). International transportation is defined in Article 1, clause (2), as:

> "any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. * * * "

The carrier is presumptively liable for death or injury to passengers (Art. 17) and for loss of or damage to property (Art. 18), but is entitled to a limitation of its liability to certain specified amounts (Art. 22). The Convention further provides (Art. 25) that the carrier shall not be entitled to the benefit of the provisions excluding or limiting liability if the damage is caused by wilful misconduct on the part of the carrier or its agents.

It should be emphasized that the petitioners, if they had so elected, might have alleged a cause of action pursuant to Article 25 of the Convention and obtained a trial of the

issue as to the carrier's right to the limitation of liability provided in Article 22. They deliberately chose, however, to forego pleading any allegation of wilful misconduct on the part of the carrier or its agents, which is a prerequisite to the recovery of an unlimited amount in accordance with the provisions contained in Article 25.

In recommending the adherence of this country to the Convention, Secretary of State Hull in his report to the President declared (Senate Document, Executive G, 73rd Cong. 2nd Sess.):

> "This Convention has been studied by the Department of Commerce, which advises adherence thereto by the Government of the United States. That Department has expressed the view that the provisions of the Convention are fair and afford protection to the air-transport operator as well as to passengers and shippers, and that if the United States fails to become a party to the Convention American air-transport lines operating on an international basis will be at a disadvantage while operating in countries that are parties to the Convention."

The Opinions of the Courts Below.

On the initial proceeding, the Justices of the Appellate Division were unanimous in the view that the motion to strike the defenses was properly denied. In an opinion by Mr. Justice HAGARTY (R. pp. 75-80; reported at 269 App. Div. 287) the Court reviewed the provisions of the Convention, including the definition of international transportation contained in Article 1 thereof, and concluded as follows (R. pp. 77-78; 269 App. Div. at pp. 291, 292):

> "The contract comes precisely within the scope of the definition of 'international transportation' employed in the Warsaw Convention. (Cf. *Grein* v. *Imperial Airways, Ltd.* [1937], 1 K. B. 50.)

> Inasmuch as the Convention, as a treaty, constitutes part of the law of this land, overriding State law and policies (U. S. Const., art. VI, § 2; *Wyman* v. *Pan American Airways*, 181 Misc. 963, affd. 267 App. Div. 947, affd. 293 N. Y. 878, certiorari denied April 23, 1945, 324 U. S. 882; *United States* v. *Pink*, 315 U. S. 203, 230, 231), its provisions supersede the usual doctrine that the right and measure of recovery are governed by the *lex loci* and not by the *lex fori*. It comes to this: One is not bound to seek redress in the courts of this country. He may submit to the jurisdiction of the foreign State and, presumably, have his rights determined in accordance with the law of that place. That is not our concern. But if he institutes action here, the law which we will apply is that set forth by the terms of the Convention, even though it be inconsistent with the law of the place. Comity is abridged to that extent. (*The Titanic*, 233 U. S. 718; *Royal Mail S. Packet Co.* v. *Companhia de Nav. Lloyd Brasileiro*, 31 F. 2d 757; *The Mandu*, 102 F. 2d 459.)"

The Appellate Division held further (R. pp. 78-80) that the Convention is self-executing and that its limitation provisions are valid and enforceable.

The affirmance by the Court of Appeals was unanimous and without opinion, 295 N. Y. 852. Thereafter, petitioners' motion in the Court of Appeals for a modification of the remittitur so as to show that a treaty and questions under the Constitution of the United States were necessarily considered and passed upon by the Court in their decision was denied without opinion (R. pp. 102, 103).

In the further proceedings for judgment following this Court's denial of certiorari, the Appellate Division (R. p. 151; 274 App. Div. 996) with a memorandum opinion unanimously affirmed the order of the New York Supreme Court, Westchester County, entering judgment in favor of the

plaintiffs for $8,291.87 and striking so much of plaintiffs' claim as exceeded that amount. In so holding, the Appellate Division referred to the prior decisions in the case and held that an additional point raised by plaintiffs was without merit.

The New York Court of Appeals without opinion unanimously denied leave to appeal (R. p. 162).

POINT I.

The courts have on repeated occasions unanimously upheld the validity of the Warsaw Convention and this Court has heretofore declined to review a final judgment in an action for wrongful death limiting the amount of recovery under the Warsaw Convention. *Wyman* v. *Pan American Airways, Inc.*, 324 U. S. 882.

The constitutionality of the Warsaw Convention has been sustained by every court which has had the Convention before it.

Wyman v. *Pan American Airways, Inc.*, 181 Misc. 963, 267 App. Div. 947, 293 N. Y. 878, cert. den. 324 U. S. 882;

Garcia v. *Pan American Airways, Inc.*, 269 App. Div. 287, affd. 295 N. Y. 852;

Ross v. *Pan American Airways, Inc.*, 299 N. Y. 88, 85 N. E. (2d) 880;

Indemnity Insurance Company of North America v. *Pan American Airways, Inc.*, 58 F. Supp. 338;

Lee v. *Pan American Airways, Inc.* (Supreme Court, Westchester County, not officially re-

ported, N. Y. Law Journal, Dec. 1, 1947, p. 1548; affd. App. Div., 2d Dept., N. Y. Law Journal, May 24, 1949, p. 1853, col. 1.)

In the *Wyman* case above, which this Court refused to review, petitioners were the executors of a passenger en route from San Francisco to Hong Kong on the aircraft "Hawaii Clipper", who lost his life when the aircraft disappeared in flight between Guam and Manila, P. I. The case was tried in the New York Supreme Court and following the conclusion of the trial, the Court directed judgment for the plaintiffs in the amount prescribed by the Convention, declaring (181 Misc. at pp. 964-965):

> "The rights of the parties are fixed by the rules for 'International Air Transportation' established and concluded at Warsaw, Poland, on October 12, 1929, at a convention of nearly all governments, including the United States. Final adherence to this international treaty on the part of the United States was proclaimed by the President on October 29, 1934 (49 U. S. Stat. 3000), which thus becomes part of the law of the land ((U. S. Const., art. VI; *United States* v. *Belmont*, 301 U. S. 324), superseding State Law (*Moscow Fire Ins. Co.* v. *Bank of New York*, 280 N. Y. 286; *Conklin* v. *Canadian-Colonial Airways*, 266 N. Y. 244). The said rules were made a condition of the ticket herein (*Murray* v. *Cunard Steamship Co. Ltd.*, 235 N. Y. 162) and in any event are so made under the rules themselves (art. 3, subd. 2).
>
> The Warsaw Convention rules are applicable only to international flights (art. 1) and raise a presumption of liability on the part of the carrier for injury or death to a passenger (arts. 17, 20) limited to 125,000 francs or approximately $8,300 under the rate of exchange fixed (art. 22) except where the carrier is guilty of 'wilful misconduct' (art. 25)."

This decision was affirmed unanimously without opinion both by the Appellate Division, First Department, 267 App. Div. 947, and the Court of Appeals, 293 N. Y. 878. This Court denied certiorari, 324 U. S. 882.

The decision in the *Wyman* case was recently followed by the New York Court of Appeals in another case involving the application of the Warsaw Convention, *Ross* v. *Pan American Airways, Inc.*, above. This action was founded on the same accident with which the present case is concerned.

The validity of the Warsaw Convention has also been upheld by a federal court in the case of *Indemnity Insurance Company of North America* v. *Pan American Airways, Inc.*, above. This latter case which also arose out of the same accident was an action in the United States District Court for the Southern District of New York. The second and third defenses in that case were substantially identical to the first and second defenses in the case at bar. Plaintiff's motion to dismiss the defenses was denied in all respects by Judge RIFKIND who held (1) that the Warsaw Convention is constitutional, (2) that it is self-executing and its provisions govern the rights of parties in international air transportation as a matter of law and (3) that since the Convention is valid and operative, the defense based upon the contract of transportation incorporating the terms of the Convention is likewise sufficient in law. The Court rejected plaintiff's contention that since the cause of action arose under the law of Portugal, the provisions of the Warsaw Convention could not be applied to limit the defendant's liability.

These decisions not only do not conflict with each other but are fully in accord with established principles governing the application and effect of treaties to which the United States has become a party.

U. S. Constitution, Article VI, Clause 2;

Foster v. *Neilson,* 2 Peters (27 U. S.) 253, 314;

U. S. v. *Rauscher,* 119 U. S. 407, 417-418;

Dainese v. *Hale,* 91 U. S. 13, 18-19;

Asakura v. *Seattle,* 265 U. S. 332, 341;

Valentine v. *U. S. ex rel. Neidecker,* 299 U. S. 5, 10;

Bacardi Corp. v. *Domenech,* 311 U. S. 150, 161.

In addition, the several courts that have had to consider the question have also unanimously ruled that the provisions of the Convention are self-executing and do not require implementing legislation for their enforcement. As pointed out above, the District Court specifically so held in *Indemnity Insurance Company of North America* v. *Pan American Airways, Inc.,* 58 F. Supp. 338, as did the lower courts in the case at bar. See, also: *Wyman* v. *Pan American Airways, Inc.,* 181 Misc. 963, affd. 293 N. Y. 878, certiorari denied, 324 U. S. 882.

Petitioners on page 18 of their petition, refer to the case of *Choy* v. *Pan American Airways Co.,* 1941 A. M. C. 483, 1942 U. S. Av. Rep. 93 (S. D. N. Y.), as a case in which the Court held that the Convention is "not self-executing and does not constitute a rule of law capable of enforcement by the courts". The petitioners have wholly misapprehended the decision in that case. The defendant moved to dismiss a cause of action based on the Warsaw Convention on the ground that the Convention does not create an independent right of action. The motion was properly granted. The defendant did not contend, nor did the Court hold, that the Convention is inoperative as a limitation law. The defendant pleaded the Convention as a separate defense exactly

as in the case at bar. The sufficiency of the defense was not at issue on the motion and was not passed upon by the Court. It is true, as the Court pointed out in the *Choy* case, and as was also held in the *Wyman* case, that the Convention does not create a substantive right of action. It is a limitation law pure and simple and as such requires no implementing legislation.

POINT II.

Petitioners' arguments that the Convention contravenes the commerce power and is contrary to the Fifth Amendment to the Constitution have been rejected by the courts.

There is nothing novel in petitioners' contentions that the Warsaw Convention conflicts with the commerce clause and with the Fifth Amendment to the Constitution. They are sufficiently disposed of by the reasoning of Judge RIFKIND in *Indemnity Insurance Company of North America* v. *Pan American Airways, Inc.*, 58 F. Supp. 338 (S. D. N. Y.). In rejecting the same arguments, the Court declared (pp. 339-340):

> "The alleged conflict between the Treaty and the Constitution is asserted to reside in the fact that the Treaty professes to regulate commerce, a power entrusted exclusively to Congress by article 1, section 8, clause 3, without having received the approval of both Houses of Congress. The Warsaw Convention, it is not disputed, was made by the President with the advice and consent of the Senate, two-thirds of the Senators present concurring. Article 2, section 2, clause 2. No reported decision has been called to my attention wherein the validity of a treaty duly ratified in the manner prescribed by the Constitution has been challenged on the ground that it con-

flicts with the power vested in Congress to regulate commerce. While the novelty of an argument is not to be taken against it, nevertheless one cannot fail to observe the uninterrupted uniformity of the practice by which treaties of commerce, from the earliest days of the Republic, have been made in the manner now challenged, without arousing so much as a doubt as to the propriety of the course taken. The broad sweep of the treaty making power is in good measure reflected in the absence of any decision holding a treaty unconstitutional. 63 C. J. 829; *United States* v. *Thompson*, D. C. E. D. Ark. 1919, 258 F. 257; Butler, Treaty Making Power, Section 454; *In re Terui*, 1921, 187 Cal. 20, 200 P. 854, 17 A. L. R. 630.

Plaintiff cites *Board of Trustees* v. *United States*, 1933, 289 U. S. 48, 56, 53 S. Ct. 509, 77 L. Ed. 1025, *Weber* v. *Freed*, 1915, 239 U. S. 325, 36 S. Ct. 131, 60 L. Ed. 308, Ann. Cas. 1916C, 317, *The Abby Dodge*, 1912, 223 U. S. 166, 32 S. Ct. 310, 56 L. Ed. 390. On the point in issue these cases say no more than that the power of Congress to regulate interstate and foreign commerce is exclusive and plenary as against encroachment by state action. They contribute no support to plaintiff's contention. On the other hand, in *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 1943, 318 U. S. 36, 42, 63 S. Ct. 488, 87 L. Ed. 596, the court referred to the Ship Owners' Liability Convention of 1936, 54 Stat. 1695, as confirming the right of a seaman to maintenance and cure, without intimating the possibility that the treaty transgressed the commerce clause. And see *Wyman* v. *Pan American Airways, Inc.*, 1943, 181 Misc. 963, 43 N. Y. S. 2d 420, affirmed 267 App. Div. 847, 48 N. Y. S. 2d 459.

* * * * * *

The argument that the treaty is invalid because it deprives plaintiff of its property without due process is rejected. See The Fire Statute, R. S. § 4282, 46 U. S. C. A. § 182; Vessel Limitation of Liability Statute, R. S. § 4283, 46 U. S. C. A. § 183;

Providence & New York Steamship Co. v. *Hill Mfg. Co.*, 1883, 109 U. S. 578, 3 S. Ct. 379, 617, 27 L. Ed. 1038; Workmen's Compensation Laws; *Mountain Timber Co.* v. *Washington*, 1917, 243 U. S. 219, 37 S. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642."

Petitioners herein urge further that although the New York courts have found as a matter of fact and law in the present case that the contract of transportation falls squarely within the definition of international transportation contained in Article 1 of the Convention, our courts must apply the law of Portugal, where the accident occurred, to the exclusion of the Convention. This argument is completely erroneous.

As the Appellate Division correctly pointed out, rights of action under Portuguese law are enforced here solely as a matter of comity. The provisions of the Convention, as part of the law of the land, "supersede the usual doctrine that the right and measure of recovery are governed by the *lex loci* and not by the *lex fori.* * * * Comity is abridged to that extent" (269 App. Div. at p. 292). This ruling is no more than a paraphrase of the words of Mr. Justice HOLMES in *The Titantic (Oceanic Steam Nav. Co.* v. *Mellor)*, 233 U. S. 718. In that case, following the loss of the Titanic, a British vessel, numerous claimants, including British as well as American citizens, brought suit in the Federal and State courts to recover for loss of life and personal injuries, alleging that their rights were governed by British law. The shipowner filed a petition to limit its liability under the Federal statutes. Two of the claimants filed exceptions, asserting that the law of the United States would not apply. In holding that the exceptions should have been dismissed, this Court said (233 U. S. at pp. 732-733):

"* * * It is true that the foundation for a recovery upon a British tort is an obligation created

by British law. But it also is true that the laws of the forum may decline altogether to enforce that obligation on the ground that it is contrary to the domestic policy, or may decline to enforce it except within such limts as it may impose. *Cuba Railroad Co.* v. *Crosby*, 222 U. S. 473, 478, 480. Dicey, Conflict of Laws, 2d ed., 647. It is competent therefore for Congress to enact that in certain matters belonging to admiralty jurisdiction parties resorting to our courts shall recover only to such extent or in such way as it may mark out. *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527. The question is not whether the owner of the Titanic by this proceeding can require all claimants to come in and can cut down rights vested under English law, as against, for instance, Englishmen living in England who do not appear. It is only whether those who do see fit to sue in this country are limited in their recovery irrespective of the English law. That they are so limited results in our opinion from the decisions of this court, * * *

* * * A law that limits a right in one case may limit a remedy in another. This statute well might be held to announce a general policy, governing both obligations that arise within the jurisdiction and suits that are brought in the courts of the United States. *Emery* v. *Burbank*, 163 Massachusetts, 326, 328. It clearly limits the remedy, as we have shown, in cases where it has nothing to say about the rights. * * *"

See, to the same effect, *The Mandu*, 102 F. (2d) 459, 463 (C. C. A. 2), and *Royal Mail Steam Packet Co.* v. *Companhia de Navegaco Lloyd Brasileiro*, 31 F. (2d) 757, 759 (E. D. N. Y.), applying the same rule in cases of collisions occurring within the territorial waters of Brazil and Belgium.

Petitioners, at pages 40 and 41 of their brief, rely on extensive quotations from the opinion of Judge CARDOZO in the case of *Loucks* v. *Standard Oil Company*, 224 N. Y. 99. The essential portion of such quotations is the statement (p. 111) that "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness."

The significance of the *Loucks* case as applied to the present situation lies, however, not in the parts of the opinion which the petitioners have quoted but in a sentence which they have omitted from their brief and which immediately precedes the above quotation. The omitted sentence reads (p. 111):

> "The sovereign in its discretion may refuse its aid to the foreign right."

The fallacy of the petitioners' reasoning is contained in this omission. In the *Loucks* case, Judge CARDOZO held that the courts, of their own motion, may not refuse to enforce or may not abridge a foreign right unless it is contrary to public policy. But the learned Judge was also careful to point out that the sovereign, as distinguished from the courts, may (*e. g.*, through the legislature or through adherence to treaties) refuse its aid to the foreign right. The petitioners have entirely overlooked this distinction between the power of the courts and the power of the sovereign.

Furthermore, the petitioners have completely misapprehended the difference between a right and a remedy. This distinction was early pointed out by the New York Court of Appeals in the case of *Wooden* v. *W. N. Y. & P. R. R. Co.*, 126 N. Y. 10. In this case, the action for wrongful death, which arose in Pennsylvania, was brought in New York and

the Court in discussing the differences between the *lex loci* and the *lex fori* stated at page 16:

> "But the second difference relied on is that in Pennsylvania there is no restriction upon the amount of damages which may be recovered, while in our state they cannot exceed five thousand dollars. That restriction pertains to the remedy rather than the right. (*Dennick* v. *Central Railroad of New Jersey*, 103 U. S. 11.) It is a limitation upon the discretion of the jury in fixing the amount of damages, but not upon the right of action or its inherent elements or character. *The restriction indicates our public policy as to the extent of the remedy, and the plaintiff who chooses to avail herself of our remedial procedure must submit to our remedial limitations and be content with a judgment beyond which our courts cannot go. They cannot exceed it in a case arising here, and no principle of comity requires them to enlarge the remedy which the plaintiff voluntarily seeks.* * * * *The difference between the two statutes, therefore, does not strictly affect the rule of damages, but rather the extent of damages, and that extent, as limited or unlimited, does not enter into any definition of the right enforced or the cause of action permitted to be prosecuted.* * * * " (Italics supplied.)

Moreover, it is to be noted that Portgual, although not a party to the Convention at the time of the accident, became an adherent March 20, 1947; see *United States Aviation Reports*, June, 1949, Treaty Data. Since the Convention relates to matters of remedy rather than substantive right, it is clear that the same rules of recovery would be applied whether the plaintiffs were suing here or in Portugal. In the face of this, their suggestion that they have been unconstitutionally deprived of some relief that would be accorded them under the law of Portugal is without substance in fact.

POINT III.

Petitioners' argument that the provisions of the Convention may not be invoked in litigation between citizens of the United States is without merit.

Petitioners make the further point that the provisions of the Convention may not be invoked in litigation between citizens of the United States. No such limitation is to be found in the pronouncements of this Court. To the contrary, in *Edye* v. *Robertson* (*Head Money Cases*), 112 U. S. 580, this Court said, concerning the effect of treaties upon the rights of private litigants (pp. 598-599):

> "A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."

See, also:

> *Maiorano* v. *Baltimore & Ohio R. R. Co.*, 213 U. S. 268, 272-273;
>
> *Hamilton* v. *Erie R. R. Co.*, 219 N. Y. 343, 351-352.

Concerning the extent of the treaty-making power, this Court said in *Holden* v. *Joy*, 17 Wall. (84 U. S.) 211, 242-243:

> "Express power is given to the President, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur, and inasmuch as the power is given, in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution in-

> tended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not consistent with the nature of our government and the relation between the States and the United States."

See, also:

> *Holmes* v. *Jennison*, 14 Pet. (39 U. S.) 540, 569-570;
>
> *Geofroy* v. *Riggs*, 133 U. S. 258, 266-267.

The case of *Skiriotes* v. *Florida*, 313 U. S. 69, upon which petitioners rely, lends no support to their position. In that case the appellant, a citizen of Florida, had been convicted under a Florida statute forbidding the use of diving equipment in the taking of sponges from the Gulf of Mexico off the coast of Florida. Appellant sought to rely upon certain treaties with Spain and other countries for the prevention of smuggling of intoxicating liquors, his purpose being to show that the place at which the diving operations were conducted was outside the limits of the territorial waters of Florida. The Court pointed out that the appellant was not in a position to invoke the treaties, and that in any event,

> "* * * Even if it were assumed that the *locus* of the offense was outside the territorial waters of Florida, it would not follow that the State could not prohibit its own citizens from the use of the described divers' equipment at that place" (p. 76).

Concerning the scope of the power of the United States over its own citizens, the Court commented as follows (313 U. S. at p. 73):

> "* * * the United States is not debarred by any rule of international law from governing the conduct

> of its own citizens upon the high seas *or even in foreign countries* when the rights of other nations or their nationals are not infringed." (Italics ours.)

What the petitioners' argument comes down to is this—that the powers of the federal government may not be exercised by treaty, as distinguished from statute, to regulate the rights of United States citizens *inter se* as to claims arising within a foreign jurisdiction or to control the remedy in the courts of this country. The *Skiriotes* case certainly gives no support to any such contention. As the Appellate Division correctly held in the case at bar (269 App. Div. at p. 292):

> "* * * The Convention is not concerned with reciprocal treatment of nations; its purpose is to unify rules relating to international transportation by air. There is nothing in the Convention which conditions its application upon nationality but, on the contrary, its provisions affect the rights of all litigants. It must be so enforced. (*Head Money Cases*, 112 U. S. 580, 598, 599; *Hamilton* v. *Erie R. R. Co.*, 219 N. Y. 343, 352; *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36, 41, 42)."

POINT IV.

Petitioners' arguments that the requirements of the Convention were not complied with herein are questions of fact and law already decided by the New York courts and are, in any event, without substance.

Petitioners argue that the conditions of the Convention were not met in that the transportation herein was not international transportation. The Appellate Division decided (269 App. Div. 287) as a matter of fact and law that:

> "The contract comes precisely within the scope of the definition of 'international transportation'

> employed in the Warsaw Convention. (Cf. Grein v. Imperial Airways, Ltd. [1937] 1 K. B. 50)."

This decision was unanimously affirmed by the New York Court of Appeals, 295 N. Y. 852.

Petitioners, in the second proceeding herein, brought forth a so-called "additional objection" to the effect that the contract of transportation (the ticket) fails to comply with the requirement of Article 3(1)(e) of the Warsaw Convention that it shall contain "a statement that the transportation is subject to the rules relating to liability established by this Convention". The statement contained in the contract of transportation was that "transportation under the annexed flight coupons is subject to the rules relating to liability established by the Convention of Warsaw of 12th October 1929". They claim that this statement fails to meet the requirements of the Convention in referring to it as "the Convention of Warsaw of 12th October 1929" (the name by which the Convention is commonly known), instead of as the "Convention for the Unification of Certain Rules Relating to International Transportation by Air", which they claim is the exact technical title of the Convention. It was determined by the Supreme Court, Westchester County, and the Appellate Division, Second Department, on the second proceeding herein that as a matter of fact and law, the requirements of Article 3(1)(e) of the Warsaw Convention were met by the ticket issued in this case. In dismissing this additional argument raised by petitioners, the Appellate Division said (274 App. Div. 996):

> "There is no merit in the additional contention presented on this appeal that the ticket issued to the decedent did not comply with the requirement of the Warsaw Convention that it contain a statement that his transportation was subject to the rules relating to liability established by the Convention."

The New York Court of Appeals, without opinion, unanimously denied leave to appeal from this decision.

The decisions of the New York courts that transportation in the instant case was "international" and that the ticket herein complied with Article 3(1)(c) of the Convention were reaffirmed by the Court of Appeals in *Ross* v. *Pan American Airways, Inc.*, 299 N. Y. 88, 85 N. E. (2d) 880. There the Court in passing on a ticket of another passenger on the same flight involved herein said (p. 95):

> "This copy of a ticket is in exactly the same form as the one on which passenger Diaz traveled in *Garcia* v. *Pan American Airways (supra)* and the holding there was * * * as it must be here, that the flight of defendant's Yankee Clipper during which appellant was injured, was 'international transportation' to which the Warsaw Convention was applicable, and that the ticket issued in appellant's name complied in form and content with article 3 of the Convention."

Conclusion.

The petition should be denied.

Respectfully submitted,

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